Supreme Court, U.S.
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No. 94-462

In The

Supreme Court of the United States

October Term, 1994

CITY OF GRAPEVINE, TEXAS,

Petitioner,

vs.

DEPARTMENT OF TRANSPORTATION; FEDERICO PENA, as Secretary of Transportation; FEDERAL AVIATION ADMINISTRATION; DAVID R. HINSON, as Administrator of the Federal Aviation Administration; and DALLAS/FORT WORTH INTERNATIONAL AIRPORT BOARD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

OPPOSITION OF RESPONDENT DALLAS/FORT WORTH INTERNATIONAL AIRPORT BOARD TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REASONS FOR DENYING THE WRIT 1

A. The FAA Gave No Approvals In Violation of the National Historic Preservation Act; DFW Airport Expects Those Procedures To Be Followed and Recognizes That the FAA Must Still Review and Issue Final Approval of the West Runway 2

B. The FAA Approved Only a Few Short Term Projects Out of the Entire Long-Term Master Plan 4

C. No Categorically Excluded Projects Were Approved Without Environmental Analysis; The EIS Explicitly Includes the Environmental Impacts of Such Projects..... 5

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASE

Vieux Carre Property Owners v. *Brown*, 948 F.2d 1436 (5th Cir. 1991) 3

FEDERAL STATUTES

National Historic Preservation Act, 16 U.S.C. § 470f 2

National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* 5

REASONS FOR DENYING THE WRIT

This Petition entirely turns on whether the Federal Aviation Administration ("FAA") meant what it said when it gave limited approval to proposed construction at Dallas/Fort Worth International Airport ("DFW Airport"). On one side are the words of the FAA's Record of Decision ("ROD") and Environmental Impact Statement ("EIS"), the repeated acknowledgments of DFW Airport that it only received limited FAA approvals, representations to that effect made to the Court of Appeals by the FAA and DFW Airport, and the finding by the Court of Appeals that the FAA's approvals were limited. On the other side are Petitioner's exaggerations and misstatements of these basic facts.

These are questions of fact, not law. All that is in issue in this Petition is whether the Court of Appeals acted correctly in believing that the FAA and DFW Airport meant what they said.

Petitioner's quarrel over the facts does not come within the "character of reasons" identified in Supreme Court Rule 10 which may, in the Court's discretion, support the issuance of a writ of certiorari.

Petitioner says that the FAA approved $3.5 billion of projects. The FAA, DFW Airport and the Court of Appeals say that the approval was much more limited. Petitioner says that numerous projects were approved without environmental analysis. The FAA in its EIS, confirmed by the Court of Appeals, analyzed those impacts.

Respondent Dallas/Fort Worth International Airport Board owns and operates DFW Airport, the second busiest airport in the world. Working with the FAA, DFW Airport has proposed to add two new runways to the six existing runways to eliminate delay and congestion and to improve air transportation service. The proposed new east runway has been under construction for a year and was given full and final approval by the FAA in the ROD. The proposed new west runway, which is proposed to be built when the need arises, received conditional approval subject to further environmental analysis and completion of the required procedures under the National Historic Preservation Act. Except for several small projects related to the new runways, DFW Airport did not seek, and did not get, approval of the rest of the $3.5 billion development program.

A. The FAA Gave No Approvals In Violation of the National Historic Preservation Act; DFW Airport Expects Those Procedures To Be Followed and Recognizes That the FAA Must Still Review and Issue Final Approval of the West Runway

Petitioner claims that the FAA approved the new west runway before completing the procedures required by § 106 of the National Historic Preservation Act, 16 U.S.C. § 470f ("NHPA"). The FAA explicitly conditioned its approval of the west runway on completion of those procedures. The ROD says so. Both the FAA and DFW Airport said so to the Court of Appeals, and the Court of Appeals found the FAA's approval to be limited in just that way. (Pet. Br. A-14 - A-15). Petitioner says that the FAA did not mean what it said.

DFW Airport supports, and will not duplicate, the arguments of the Solicitor General on this point. He is in the best position to state the position of the federal respondents. However, DFW Airport is in the best position to state the Airport's own expectations and understanding of what the FAA approved. DFW Airport does not think it has the approvals Petitioner asserts it has, and does not intend to rely on such a broad view of what the FAA did.

DFW Airport believes that it has a full unconditional approval for construction of the new east runway. There has, in fact, been no challenge under the NHPA to the east runway. Petitioner's entire argument is focused on the *west* runway. DFW Airport thinks it has conditional approval of that runway subject, as the FAA explicitly said in its ROD, to completion of the NHPA § 106 process. With respect to the west runway the FAA said: "Commencement of construction cannot proceed prior to the completion of the Section 106 process, even if the project should be funded without federal funds." Pet. Br. A-38. The Court of Appeals agreed. Pet. Br. A-14. DFW Airport understands that, and further understands that the § 106 process might result in changes to the west runway.

This limited approval is entirely consistent with the rule quoted by Petitioner (Pet. Br. 12) from *Vieux Carre Property Owners* v. *Brown*, 948 F.2d 1436, 1445 (5th Cir. 1991). The Advisory Council on Historic Preservation ("ACHP") has been afforded an opportunity to comment prior to the issuance of the FAA's approval of the west runway. The ACHP has, in fact, commented, and the FAA's approval has, in fact, not yet been issued.

Petitioner ignores the fact that the FAA explicitly conditioned its approval on completion of the § 106 process. Petitioner asks this Court to hear this case to find a different fact.

B. The FAA Approved Only a Few Short Term Projects Out of the Entire Long-Term Master Plan

Petitioner suggests that the FAA approved $3.5 billion of projects, including a new terminal building. But the FAA in fact only approved the new east runway and certain related projects. The new terminal building is not approved.

In the face of huge increases in traffic wanting to use its facilities, DFW Airport commissioned a new master plan for its 17,500 acres in 1988. The resulting plan extends far into the future, and includes many projects which are speculative and may never be built. The new terminal building, which is a reconfiguration of existing terminals located in a place which has been reserved for terminals since the airport was designed more than 20 years ago, is highly speculative. DFW Airport has no funding, no timetable and no final design for such a building. The FAA did not approve it because there is nothing to approve and construction, if and when it occurs, will happen only after all environmental analysis required by law has been performed.

DFW Airport and the FAA tried to provide full public disclosure with respect to plans for the airport. But that does not mean that every project shown on a very long range plan will be built as shown or built at all. The FAA

explained in the ROD that its full approval for construction was limited to the east runway and related projects. Petitioner simply ignores this fact. Instead Petitioner asks this Court to hear this case in order to find that the facts are different from what the FAA said and the Court of Appeals accepted as true. This is not an appropriate basis for the grant of a writ of certiorari.

C. No Categorically Excluded Projects Were Approved Without Environmental Analysis; The EIS Explicitly Includes the Environmental Impacts of Such Projects

Petitioner's second and third arguments claim that the FAA approved the entire airport master plan while circumventing the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"). Petitioner says the FAA ignored cumulative impacts of multiple projects and misused the NEPA procedures for "categorical exclusions." Petitioner appears to be particularly concerned about a possible new terminal building.

Petitioner's argument is baffling. The FAA did describe numerous projects as "categorically excluded," but then said:

> nevertheless, the impacts of all of these categorical exclusions are considered in the EIS. (Final EIS, App. 18, p. 18)

See also, Pet. Br. A-34. The FAA cannot segment a project into smaller pieces to avoid environmental review. All of the law about segmentation and cumulative impact under NEPA is about attempts to avoid environmental impact analysis. Here, the FAA avoided nothing, but rather

included the categorically excluded projects in its environmental analysis. The FAA made this clear repeatedly.

Petitioner does not explain what is missing from the environmental analysis with respect to these projects. Taking everything they say to be true about the relationship between a new terminal building and the runways, for example, what is missing from the Final EIS? Nothing. The terminal building, and many other categorically excluded projects were, nevertheless, included in the EIS environmental analysis.

The FAA said that it included these projects in the environmental analysis. Petitioner asks this Court to hear this case on the premise that what the FAA said is not true. This again is not an appropriate basis for issuance of a writ.

CONCLUSION

Petitioner has its facts wrong. Petitioner says that the FAA did what it did not do, and that the FAA intended what the FAA did not intend. The FAA's view of what it said and meant is confirmed by DFW Airport, which understands and has stated its own view that the FAA's actions were limited approvals.

These fact-intensive issues were reviewed by the Court of Appeals and provide no proper basis for seeking the extraordinary review of this Court.

DFW Airport respectfully requests that the petition for issuance of a Writ of Certiorari be denied.

Dated: November 14, 1994

Respectfully submitted,

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